

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38142

JAMES BUTLER RAMSEY,	)	2011 Unpublished Opinion No. 667
	)	
Petitioner-Appellant,	)	Filed: October 19, 2011
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment dismissing successive petition for post-conviction relief, affirmed.

James Butler Ramsey, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

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LANSING, Judge

James Butler Ramsey appeals from the summary dismissal of his successive petition for post-conviction relief. He contends that the court erroneously denied his request to appoint counsel.

I.

BACKGROUND

Ramsey pleaded guilty to robbery, Idaho Code § 18-6501; grand theft by possession of stolen property, I.C. §§ 18-2403(4), 18-2407(1); and aggravated assault, I.C. §§ 18-901(b), 18-905(a). At sentencing, Ramsey's attorney asked the court to consider a psychological evaluation that was included in the presentence investigation report (PSI). The evaluation apparently suggested that Ramsey had Attention Deficit/Hyperactivity Disorder (ADHD), that he suffered from the effects of a traumatic birth, and that he may have been experiencing symptoms of an

early onset of Huntington's Chorea. Additionally, the evaluation apparently recommended subsequent tests to confirm a diagnosis of Huntington's Chorea.

The district court imposed concurrent unified sentences of life with twenty years determinate for robbery, fourteen years determinate for grand theft, and five years determinate for aggravated assault. We affirmed these sentences on direct appeal. *State v. Ramsey*, Docket No. 28736 (Ct. App. Apr. 22, 2003) (unpublished). In April 2004, Ramsey, through private counsel, brought his first post-conviction action. In the petition, he alleged that his trial counsel had a conflict of interest and was ineffective for failing to sufficiently investigate or present evidence of Ramsey's mental health and evidence regarding a jail fight for mitigation purposes at sentencing. The district court dismissed the petition without holding an evidentiary hearing. We affirmed the dismissal on appeal, finding the allegations presented in the petition to be speculative, conclusory, and unsupported by competent evidence. *State v. Ramsey*, Docket No. 32631 (Ct. App. Dec. 6, 2006) (unpublished).

In December 2009, Ramsey filed a successive petition for post-conviction relief in which he appears to allege that his trial counsel had a conflict of interest and was ineffective both for not presenting sufficient mitigation evidence regarding his mental health at sentencing, and for failing to sufficiently advise him of the elements of robbery. The petition was supported with an affidavit, in which Ramsey asserted:

That my Post-conviction . . . attorney never discussed factors relative to the voluntary entry of my plea prior to the filing of my initial post-conviction application;

That low-level comprehension factors complicated by my unmedicated severe ADHD prevented me from fully, freely, and intelligently understanding the consequences of my plea;

That I am untrained in the law and legal procedure and have no skills in deciphering through legal documents and/or codes to protect and safeguard the presentation of claims from unscrupulous attorney's [sic];

That since my conviction and sentence I have been incarcerated under the care and custody of the Idaho State Board of Corrections with inadequate legal resources and/or assistance to aid me with screening documents and formulating claims.

Ramsey requested that counsel be appointed to assist him with his petition. The district court denied the request for appointment of counsel. After providing notice, the district court dismissed the post-conviction petition without holding an evidentiary hearing. Ramsey timely appealed.

## II. ANALYSIS

The sole issue raised on appeal is whether the district court erred by not appointing counsel to help Ramsey investigate the claim that his trial counsel was ineffective for failing to pursue additional psychological testing that had been recommended in his psychological evaluation. Ramsey asserts that had trial counsel pursued additional testing, “[a]n array of possibilities may have surfaced, i.e. leniency in sentencing, diminished intent, and throughout the last ten years, rehabilitation programs.” Ramsey further asserts that his post-conviction counsel inadequately presented this issue in his first petition, and that due to the limited resources available to him during his incarceration, he required assistance of counsel to present the issue in his successive petition.

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Pursuant to Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802. Summary dismissal of an application is permissible when the applicant’s evidence has raised no genuine issue of material fact which, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991). Summary dismissal of an application for post-conviction relief may be appropriate even where the State does not controvert the applicant’s evidence because the court is not required to accept either the applicant’s mere conclusory allegations or the applicant’s conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

Successive petitions are impermissible unless “the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.” I.C. § 19-4908. A claim of ineffective assistance of prior post-conviction counsel is not among the permissible grounds for filing a successive post-conviction petition. *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). However, an “allegation that a claim was not adequately presented in the first post-conviction

action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief.” *Id.* Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the “sufficient reason” for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in the first petition. *See id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. *See Workman*, 144 Idaho at 522, 164 P.3d at 802.

The decision on whether to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards. *Swader v. State*, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007). A request for appointment of counsel in a post-conviction proceeding is governed by Idaho Code § 19-4904, which provides that a court-appointed attorney “may be made available” to an indigent applicant. *Workman*, 144 Idaho at 529, 164 P.3d at 809; *Gonzales v. State*, 151 Idaho 168, 171, 254 P.3d 69, 72 (Ct. App. 2011). The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Hust v. State*, 147 Idaho 682, 683-84, 214 P.3d 668, 669-70 (Ct. App. 2009); *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The standard to be applied is whether the petition alleges facts showing the possibility of a valid claim that would require further investigation on the defendant’s behalf. *Workman*, 144 Idaho at 529, 164 P.3d at 809; *Swader*, 143 Idaho at 654, 152 P.3d at 15; *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. Only if all of the claims alleged in the petition are frivolous may the court deny a request for counsel. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111. On appellate review, we “will not set aside the trial court’s findings of fact unless they are clearly erroneous” and will exercise free review of questions of law. *Id.*

In an order denying Ramsey’s request for appointment of counsel, the district court stated that it would review the file to determine whether there was a basis for post-conviction relief, and that “if the petition is not subject to summary dismissal pursuant to I.C. § 19-4906(b),

counsel will be appointed to represent the defendant at any evidentiary hearing.”<sup>1</sup> After review, the district court determined that summary dismissal was appropriate. On appeal, Ramsey contends that counsel should have been appointed because his petition included potentially meritorious claims that required assistance of counsel to fully develop--specifically, that trial counsel was ineffective for failing to pursue further testing.

The district court concluded that Ramsey’s claim had been previously adjudicated in his first post-conviction action and was without merit. The court noted that Ramsey offered no facts, such as medical records, to support his claim.<sup>2</sup> When a petitioner re-raises in a successive petition a claim that has been previously adjudicated, counsel need not be appointed unless the petitioner alleges facts that demonstrate a sufficient reason why the claim was not adequately raised in the first petition. *See* I.C. § 19-4908 (requiring a sufficient reason for subsequent claims); *Workman*, 144 Idaho at 529, 164 P.3d at 809 (requiring facts showing a valid claim that requires further investigation for the appointment of counsel). The burden to make this showing is on the petitioner. In order to demonstrate that his claim was inadequately raised in his first post-conviction action, Ramsey was required to show that there was something more that his attorney could and should have done in his first post-conviction action. Ramsey has offered only conclusory assertions that his post-conviction counsel should have investigated Ramsey’s mental health, and that had he done so, “an array of possibilities *may* have surfaced.” He has not presented, or even alleged the existence of, any evidence concerning his mental health that could have been presented in his first post-conviction action but was not proffered due to neglect or error of his attorney. His claim is entirely based on speculation. Therefore, Ramsey’s allegations do not raise even the possibility of a valid claim.

The district court correctly concluded that Ramsey’s claim is barred by Idaho Code § 19-4908 because he did not show a sufficient basis to allow a successive petition reasserting a claim

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<sup>1</sup> In *Workman*, 144 Idaho at 529, 164 P.3d at 809, the Idaho Supreme Court affirmed the district court’s decision to deny the appointment of counsel when the district court used an identical procedure--the order stated that petitioner’s request for counsel was denied, but also stated that counsel would be appointed later if the court determined that the petition was not subject to summary disposition.

<sup>2</sup> It appears that Ramsey’s successive action was untimely as it was not filed within a reasonable time after dismissal of his first action. However, the district court did not dismiss or deny counsel on that ground, and we therefore do not address it.

that was previously litigated. Ramsey raised no allegations sufficient to require the appointment of counsel. Thus, we find no error.

The order denying Ramsey's request for the appointment of counsel is affirmed.

Chief Judge GRATTON and Judge GUTIERREZ **CONCUR.**